SUPREME COURT, U. S.

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No. 71-379

In the Supreme Court of the United States

OCTOBER TERM, 1971

ROCKNEY LEE REED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

Department of Justice,
Washington, D. C. 20530.

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On July 15, 1971, the United States District Court for the Northern District of California adjudged petitioner in civil contempt for refusing to answer questions before a special grand jury after he had been granted "transactional immunity", that is immunity from prosecution with respect to any matters testified to under compulsion, under 18 U.S.C. 2514. The court committed petitioner to prison until such time as he answered the questions or the term of the grand

jury expired. On August 16, 1971, following an expedited appeal, the court of appeals affirmed.

1. On June 17, 1971, petitioner was summoned to appear before a special federal grand jury in the Northern District of California which was investigating narcotics violations. After petitioner invoked the privilege against self-incrimination, he was given transactional immunity under 18 U.S.C. 2514. Petitioner again refused to testify to the grand jury's questions, this time on the ground that the questions were derived from illegal electronic surveillance.

Thereafter, on July 14, 1971, he was brought before the district court. At that time, petitioner relying on 18 U.S.C. 2518 (10)(a) and 2515, moved to suppress the use of "any and all wire or oral communications received as the result of illegal searches of his person and premises". He filed a supporting affidavit stating that his father told him that he was working with federal agents in connection with an investigation of smuggling operations involving one Alistair Honeyman [1] and that his father informed him that his telephone wires were being tapped and that his home was being surveilled with electronic surveillance equipment.[2] Petitioner also stated that an open back door and open telephone box made him believe that there had been interceptions of his communications.

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[1] The grand jury had indicted Honeyman.

[2] Petitioner also stated in his affidavit that his father had identified individuals in front of his house as federal agents.

At the hearing on July 14, 1971, the government attorney involved in the grand jury investigation stated under oath that neither petitioner nor his premises had been the subject of any electronic surveillance and that none of his conversations had been intercepted (Tr. 5, 8, 10, 13, 17-19, 23). Petitioner stated that he would be willing to be cross-examined as to what his father told him but did not offer to call his father as a witness (Tr. 12). Following this hearing, the court ordered petitioner to appear before the grand jury and answer its questions (Tr. 28).

The next day, when petitioner appeared before the grand jury he refused to answer questions such as whether he was engaged in activity that resulted in the importation of marihuana from Mexico, whether he was on a vessel that returned from Mexico on May 3, 1970, with approximately three and a half tons of marihuana, whether he was involved in the concealment and sale of this marihuana (Tr. 35-39). He refused to answer these questions on the ground that they were derived from wiretaps (Tr. 37). He identified his father, who he said claimed to be a federal agent, as the source of this information. Petitioner admitted, however, that as far as he knew his father was in private business (Tr. 40-45). The government attorney again advised petitioner that there had been no wiretaps of his home.[3] Thereafter, peti-

[3] In response to a statement by petitioner that his father had informed him of a telephone tap the previous night, the government attorney told petitioner that the father, who had testified before the grand jury, was in the State of Washington on the previous night (Tr. 46-47).

tioner was brought before the district court. His request for a further hearing to examine the agents involved in this case was denied.

2. Petitioner has no valid excuse for refusing to answer the questions of the grand jury. The government without equivocation denied that he had been the subject of any electronic surveillance and denied that any of his conversations were overheard. This denial sufficiently answered petitioner's statement that his father told him that he was subject to an illegal electronic surveillance. Moreover, at the hearing petitioner did not call his father as a witness to support the statement.

In light of this denial by the United States, this case does not conflict with the decisions in *United States* v. *Evans*, *United States* v. *Fishlowitz*, No. 71-256, filed August 20, 1971, or *United States* v. *Egan*, *United States* v. *Walsh*, No. 71-263, filed August 20, 1971. In those cases, the government did not affirm or deny the occurrence of the alleged unlawful surveillance. See 18 U.S.C. 3504. Nor does it raise the same issue as *Gelbard* v. *United States*, No. 71-110, filed July 22, 1971, upon which the court below relied, where the government disclosed to each petitioner that he had been overheard during court-authorized wiretaps. Whether or not a grand jury witness has standing to refuse to answer on the ground that his conversations have been overheard by illegal electronic surveillance, and whether or not he is entitled to a hearing on legality when the government acknowledges that overhearings have occurred, a witness should not be allowed to refuse to answer on the

basis of a naked assertion that he has been illegally overheard, when that assertion is unsupported by any credible evidence and the government categorically denies that any overhearing has taken place. Cf. *United States* v. *Cook*, 432 F. 2d 1093, 1108-1109 (C.A. 7), certiorari denied, 401 U.S. 996.

Thus, this Court should not delay its disposition of this case pending its determination of the cases cited above, especially since delay might encourage others to raise equally fanciful claims of illegal overhearing. Congress clearly did not intend to allow grand jury proceedings to be frustrated in the circumstances of a case such as this.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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